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Via Priority Mail (Return Receipt) and Email

John P. Pucci (BBO #407560)
Bulkley, Richardson & Gelinas, LLP
1500 Main Street, Suite 2700
P.O. Box 15507
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and

James L. Messenger (BBO #547236)
Brian J. Wall (BBO #688278)
Gordon Rees Scully Mansukhani, LLP
745 Atlantic Avenue, 4th Floor
Boston, MA 02111

**Re: NOTICE OF INTENT TO FILE SUIT
UNDER THE CLEAN WATER ACT**

Messrs. Pucci, Messenger, and Wall:

This sixty day Notice of Intent ("NOI") to file a citizen suit against your client, Tennessee Gas Pipeline Company, LLC ("Tennessee" or "TGP"), a subsidiary of Kinder-Morgan, under Section 505 of the Clean Water Act¹ ("CWA") for the violations described below is served on behalf of the Sandisfield Taxpayers Opposing the Pipeline ("STOP"). Any response to this letter should be addressed to the undersigned counsel for STOP at the above letterhead address.

¹ 33 U.S.C. § 1365.

STOP is a group of residents and taxpayers who live or own property in Sandisfield, Massachusetts, one of the communities crossed by the Connecticut Expansion Project² (the “Project” or the “Pipeline”). STOP’s members live, work, and recreate in the areas proposed for the Project. Sandisfield residents are already disproportionately burdened by pipelines; all STOP members’ properties are already encumbered with rights-of-way containing two pipelines. Since the inception of this proceeding, STOP and its members have been active participants; filing comments and participating at scoping sessions. STOP has repeatedly made the Federal Energy Regulatory Commission (“FERC” or the “Commission”) aware of the adverse impacts to their recreational, aesthetic, and environmental interests that the Project will have. However, despite STOP’s well-researched, meaningful input in the proceeding, the Commission has either ignored or dismissed the environmental harms and/or impacts to the jurisdictional waters of the United States and the Commonwealth of Massachusetts which will result from the installation and operation of the Project.

Specifically, FERC issued a Certificate of Public Convenience and Necessity (“CPCN” or the “Certificate”) to Tennessee for the Project on March 11, 2016.³ Tennessee accepted this Certificate on March 16, 2016. Pursuant to Section 7 of the Natural Gas Act, having accepted the CPCN, Tennessee has been authorized by the Commission to begin eminent domain proceedings, commence felling trees, and placing construction equipment for the construction and/or “proper operation” of the facilities authorized therein.⁴ Despite the statutory prohibition against doing so, the Commission has therefore authorized Tennessee to undertake activities that “may result” in a discharge to the jurisdictional waters prior to obtaining a state water quality certification.

Section 401(a)(1) of the CWA prohibits Federal agencies from authorizing or permitting an applicant “to conduct *any* activity *including, but not limited to, the construction or operation of facilities*, which *may* result in any discharge into

² FERC Docket No. CP14-529.

³ It bears noting that the Certificate is ostensibly “conditioned” upon Tennessee’s receipt of a Water Quality Certification under Section 401 of the CWA. Assuming, *arguendo*, that such a certificate is even legally permissible, Tennessee cannot claim its protection (such as it is) or authority without first meeting the required condition, *i.e.*, securing a Section 401 Certification or waiver from the Massachusetts Department of Environmental Protection (“MassDEP”).

⁴ 15 U.S.C. § 717f(h).

the navigable waters,” prior to issuance of a state water quality certification.⁵ By statute, all field activities, including the placement of equipment for the construction or operation of, *inter alia*, transmission facilities is considered part of “oil and natural gas exploration and production” activities.⁶ For purposes of the Clean Water Act, the United States Environmental Protection Agency (“EPA”) has defined “new sources” of pollution by regulation as generally being “any building, structure, facility or installation from which there is or may be the discharge of pollutants.”⁷ As regards construction and development, a “new source” is “any source... that commences construction activity after” December 1, 2009.⁸ The construction and development point source category expressly includes “interstate natural gas pipeline construction activity” as one of the regulated sources therein.⁹ Thus, the activities authorized by even a conditional CPCN are those such as “may result” in a “discharge to the navigable waters.”¹⁰ Indeed, in conditioning the CPCN on receipt of a 401 Certification from MassDEP, the Commission implicitly acknowledges this to be true.

If there were any doubt possible as to whether Tennessee will undertake activities which may result in a discharge under the CPCN, its recent Verified Condemnation Complaint (“Complaint”) removes it.¹¹ Tennessee filed the Complaint for, *inter alia*, condemnation of certain easements on land owned by the Commonwealth and “injunctive relief to allow immediate entry and

⁵ 33 U.S.C. § 1341(a)(1) (emphasis added).

⁶ 33 U.S.C. § 1362(24).

⁷ 40 C.F.R. § 401.11(e).

⁸ 40 C.F.R. § 450.11(a); 74 FR 63057.

⁹ 40 C.F.R. Chapter I, Subchapter N, Part 450.

¹⁰ 33 U.S.C. § 1341(a)(1). *See also* *Gunpowder Riverkeeper v. Federal Energy Regulatory Commission*, 807 F.3d 267, 271 (D.C. Cir. 2015) (by granting a conditional CPCN, the Commission allows a grantee “immediately to exercise the power of eminent domain to obtain ‘the necessary right-of-way to construct, operate, and maintain a pipe line’ and to place any ‘equipment necessary to the proper operation of such pipe line.’”) (quoting 15 U.S.C. § 717f(h)).

¹¹ The Verified Complaint was filed on March 15, 2016 with the Berkshire Superior Court of the Commonwealth of Massachusetts, captioned *Tennessee Gas Pipeline Co., LLC v. Six Acres of Land More or Less, et al.* A copy of the Complaint (less supporting exhibits) is attached hereto as Exhibit 1.

possession of the easements.”¹² Specifically, Tennessee claims it “needs immediate possession to perform pre-construction activities”¹³ and to clear trees.¹⁴ These activities, according to Tennessee’s own statements, are part of the pipeline construction process.¹⁵ Tennessee’s stated intent is to complete all construction activities by November 1, 2016, and to begin construction activities by March 30, 2016.¹⁶

As noted, all field activities associated with the construction of a new pipeline are “new sources” of pollution for purposes of the Clean Water Act. Therefore, TGP’s current and imminent actions under the conditional CPCN certainly “may” result in a discharge to the waters of the United States. Tennessee is therefore obligated to secure a 401 Certification and provide it to the Commission before it may receive a license, permit, or other authorization from the Commission to conduct such actions. However, by the same token, the Commission is without power or authority to authorize such actions, absent Tennessee providing said Certification. By issuing a “conditional” CPCN to Tennessee, the Commission has permitted activities¹⁷ which may result in a discharge to the jurisdictional waters, and therefore acted in violation of Section 401. Any field activities which Tennessee undertakes, which are allegedly authorized by the certificate, prior to the issuance of the state 401 Certification are likewise in violation of the Clean Water Act.

Likewise, Tennessee will require a permit from the U.S. Army Corps of Engineers (“Corps”) under Section 404 of the CWA¹⁸ prior to engaging in any activity which may result in the discharge of dredge or fill material to the jurisdictional waters, along with a National Pollution Discharge Elimination

¹² Complaint at ¶1.

¹³ *Id.* at ¶60.

¹⁴ *Id.* at ¶61.

¹⁵ *Id.* at ¶55 (“Pipeline construction proceeds in stages, generally as follows: pre-construction activities, tree clearing, grading, excavating, trenching, stringing, welding, installation, backfilling, cleanup, grading, and restoration.”).

¹⁶ That is, within fourteen days of filing the Complaint. *See* Complaint at ¶56

¹⁷ Specifically, the commencement of Tennessee’s “construction and operation of facilities.” *See* 33 U.S.C. § 1341(a)(1); 33 U.S.C. § 1362(24).

¹⁸ 33 U.S.C. § 1344.

System (“NPDES”) Permit¹⁹ for construction activities. Beginning construction activities prior to doing or failing to do so is a violation of Section 301 of the CWA.²⁰ Absent a 401 Certification, the Corps cannot and will not issue a 404 Permit. To date, Tennessee has not received coverage under any provision of the CWA for its imminent construction.

Section 505(a)(1) of the CWA²¹ authorizes citizens to commence a civil action “against any person... who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation.” The term “effluent standard or limitation under this chapter” specifically includes, *inter alia*, “certification under section 1341 of this title.”²² Under Section 309(d) of the CWA, 33 USC § 1319(d), and 40 C.F.R. § 19, each of the above-described violations subjects the violator to a civil penalty of up to \$37,500 per day. In addition to such penalties, under Sections 505(a) and (d) of the CWA,²³ we will seek injunctive relief, costs, attorney’s fees, and any other relief as is permitted by law.

* * *

The above-described violations reflect only what information currently available to us indicates. Upon information and belief, these violations are imminent, and will be ongoing and continuous. We intend to sue for all

¹⁹ That is, a permit issued pursuant to 33 U.S.C. § 1342 by EPA or by MassDEP under its delegated authority.

²⁰ 33 U.S.C. § 1311.

²¹ 33 U.S.C. § 1365(a)(1)

²² 33 U.S.C. § 1365(f)(5). In full, the term “effluent standard or limitation under this chapter” means:

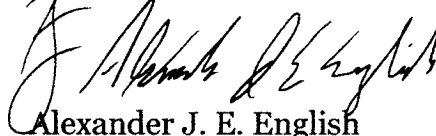
(1) effective July 1, 1973, an unlawful act under [33 U.S.C. § 1311(a)]; (2) an effluent limitation or other limitation under [33 U.S.C. §§ 1311, 1312]; (3) standard of performance under [33 U.S.C. § 1316]; (4) prohibition, effluent standard or pretreatment standards under [33 U.S.C. § 1317]; (5) certification under [33 U.S.C. § 1341]; (6) a permit or condition thereof issued under [33 U.S.C. § 1342], which is in effect under this chapter (including a requirement applicable by reason of [33 U.S.C. § 1323]; or (7) a regulation under [33 U.S.C. § 1345(d)]

²³ 33 USC §§ 1365(a) and (d)

violations, including those a) yet to be uncovered and/or b) committed after the date of this NOI.

STOP believes that this Notice of Intent to sue sufficiently states grounds for filing suit. Accordingly, following the closure of the 60-day notice period, we intend to file a citizen suit against you under Section 505(a) of the Clean Water Act, 33 USC § 1365(a), for violations thereof.

Respectfully submitted,



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Encl.

Verified Complaint, less Exhibits thereto.

CC

Gina McCarthy, Administrator, EPA
H. Curtis Spalding, Regional Administrator, EPA Region I
Martin Suuberg, Commissioner, MassDEP
Commissioners, Federal Energy Regulatory Commission

COMMONWEALTH OF MASSACHUSETTS

BERKSHIRE, ss.

SUPERIOR COURT DEPARTMENT
C.A. No.:

TENNESSEE GAS PIPELINE COMPANY, L.L.C.

Plaintiff,

v.

SIX ACRES OF LAND, MORE OR LESS, OF PERMANENT
EASEMENTS IN SANDISFIELD, MASSACHUSETTS;
FIFTEEN AND A HALF ACRES, MORE OR LESS, OF TEMPORARY
EASEMENTS IN SANDISFIELD, MASSACHUSETTS;
COMMONWEALTH OF MASSACHUSETTS; MASSACHUSETTS
DEPARTMENT OF CONSERVATION AND RECREATION;
LEO P. ROY, COMMISSIONER OF THE MASSACHUSETTS
DEPARTMENT OF CONSERVATION AND RECREATION;
WILLIAM S. BOLT; OFFICE OF THE BOARD OF ASSESSORS
OF THE TOWN OF SANDISFIELD; AND UNKNOWN
LANDOWNERS

Defendants.

VERIFIED CONDEMNATION COMPLAINT

Tennessee Gas Pipeline Company, L.L.C. ("Tennessee"), by and through its counsel,
files this Verified Complaint in eminent domain under the Natural Gas Act ("NGA"), 15 U.S.C.
§ 717f(h), and avers as follows:

I. NATURE OF CASE

1. This is a civil action for: (a) the condemnation of permanent and temporary easements under the power of eminent domain; (b) ancillary injunctive relief to allow immediate entry and possession of the easements; and (c) the ascertainment and award of just compensation to the Commonwealth of Massachusetts (the "Commonwealth"), acting by and through its Department of Conservation and Recreation ("DCR").

2. This action arises under the NGA, 15 U.S.C. § 717f(h), which authorizes a natural gas pipeline company that has received a Certificate of Public Convenience and Necessity (“Certificate”) from the Federal Energy Regulatory Commission (“FERC”), such as Tennessee, to commence eminent domain proceedings in state court.

3. Permanent and temporary easements and other interests in two lots in the Tolland/Otis State Forest in Sandisfield, Massachusetts (the “Property”) are necessary for the construction, operation and maintenance of an underground natural gas transmission pipeline that is directly adjacent to two existing underground natural gas transmission pipelines located in the Property that have been owned and operated by Tennessee for more than thirty years.

II. PARTIES

4. Tennessee is a limited liability company organized under the laws of the State of Delaware with its principal place of business in Houston, Texas and is a natural gas company as that term is defined in the NGA, 15 U.S.C. § 717a(6).

5. The Commonwealth is a municipal corporation, headquartered in Boston, Massachusetts, and administrative head of the DCR. The Property is owned by the Commonwealth. The Property is located in Sandisfield, Massachusetts.

6. DCR, with a headquarters in Boston, Massachusetts, oversees the Property and/or is a party to right-of-way agreements concerning the Property.

7. Leo P. Roy is the Commissioner of the DCR.

8. William S. Bolt is or was the holder of Spring Rights in a 1916 deed, recorded August 28, 1916 as Book 215, Page 301 in Southern Berkshire County, Massachusetts.

9. The Board of Assessors of the Town of Sandisfield is or was the holder of: (1) a Forest Land Tax Lien dated August 26, 1986 and recorded December 22, 1986 at Book 624,

Page 195 in Southern Berkshire County, Massachusetts; and (2) an Agricultural or Horticultural Recreational Tax Lien dated February 5, 1998 and recorded February 6, 1998 as Book 1049, Page 302 in Southern Berkshire County, Massachusetts. To the extent the liens have not been extinguished, the Board of Assessors of the Town of Sandisfield is only being named in its capacity as a lienholder.

10. Tennessee believes that it has identified all parties with a cognizable interest in the property, but unknown owners may have a cognizable interest and are named herein.

III. JURISDICTION AND VENUE

11. This Court has original jurisdiction over this action in equity pursuant to G.L. c. 214 § 1.

12. Venue is proper in this Court because the land over which the dispute arises is located in Berkshire County, Massachusetts.

IV. FACTUAL ALLEGATIONS

A. FERC CERTIFICATE AND AUTHORIZED ROUTE

13. Tennessee is a natural gas company as that term is defined in Section 2(6) of the NGA, 15 U.S.C. § 717a(6), and is subject to the exclusive jurisdiction of FERC.

14. On July 31, 2014, Tennessee filed an application with FERC ("FERC Application") for a Certificate to construct and operate a natural gas pipeline and related facilities known as the Connecticut Expansion Project (the "Project"). At the request of committed shippers, Tennessee requested FERC authorization by July 31, 2015 in order to meet a November 1, 2016 in-service date.

15. On October 23, 2015, FERC issued an Environmental Assessment ("EA") for the Project.

16. On March 11, 2016, FERC issued a Certificate to Tennessee determining that the Project served the public convenience and necessity, and authorizing Tennessee to construct and operate the Project, and as described in Tennessee's FERC Application. The permanent and temporary easement rights that Tennessee seeks to acquire in this Verified Condemnation Complaint appear on the alignment sheets submitted as part of Tennessee's FERC Application and are necessary to construct and operate the Project. Pursuant to the NGA, 15 U.S.C. § 717f(h), Tennessee is authorized and obligated to acquire, by eminent domain, easement rights necessary to construct the Project. A true and accurate copy of the Certificate is attached hereto as Exhibit A.

17. The Certificate states that the anticipated in-service date is November 1, 2016.

18. Tennessee accepted the Certificate on March 16, 2016.

19. The Certificate authorizes Tennessee to construct and operate an approximately 8.21-mile pipeline expansion in Connecticut/Massachusetts, a 1.4-mile pipeline expansion in New York, and a 3.8-mile pipeline expansion in Massachusetts. A true and accurate copy of the FERC-authorized route, including through Massachusetts, is attached hereto as Exhibit B.

20. The Project will supply 72,100 decatherms per day (Dth/d) of new natural gas pipeline capacity. This increased supply and capacity will lower natural gas prices and increase the reliability of the power system.

21. In Massachusetts, the Certificate authorizes and obligates Tennessee to traverse 1.8 miles of land in Sandisfield and Agawam owned by ten private landowners. Each of these ten private landowners has voluntarily granted Tennessee the requested easements.

22. The Certificate also authorizes and obligates Tennessee to traverse across approximately two miles of the Property. The FERC-approved route through the Property is

directly adjacent to two existing underground natural gas pipelines located in the Property that have been owned and operated by Tennessee for more than thirty years. The corridor above the existing underground natural gas pipelines ranges in distance from fifty to ninety feet.

Tennessee cleared and maintains the corridor above the existing pipeline, which is used year-round by DCR as a walking and hiking trail and as a snowmobile trail in the winter. The recently approved pipeline will be directly adjacent to the two existing pipelines. Tennessee's acquisition of the permanent easements is authorized by FERC, and will widen an existing pipeline corridor by a distance ranging from ten to thirty-five feet.

23. The Property is comprised of two lots (MBL 405-0-8 and 402-0-3) on approximately 465 acres, which are more fully described in deeds recorded in the Berkshire Country Registry of Deeds in Book 1780, page 322 and Book 254, page 428. The owner of MBL 405-0-8 is the Commonwealth. DCR is a party to right-of-way agreements concerning MBL 405-0-8. The owner of MBL 402-0-3 is the Commonwealth, acting by and through the Commissioner of DCR. Pursuant to G.L. c. 7C, § 32, all real property held in the name of state agency shall be deemed property of the Commonwealth. MBL 405-0-8 and 402-0-3 are collectively referred to as the "Commonwealth Properties" or "Commonwealth Parcels." DCR manages the Commonwealth Properties.

B. EASEMENTS

24. In order to construct the Project as described in Tennessee's FERC Application and as authorized by FERC, Tennessee needs to obtain permanent easements ranging in width from ten to thirty-five feet over approximately six acres on the Commonwealth Parcels (the "Permanent Easements"). The Permanent Easements are located directly adjacent to the two existing pipelines and the existing pipeline corridor. The two Commonwealth Parcels are

separated by a parcel that is owned by a private land owner who has voluntarily granted Tennessee an easement.

25. On MBL 405-0-8, Tennessee seeks a Permanent Easement of 194,844 square feet. Additionally, on MBL 405-0-8, Tennessee seeks a permanent access road easement ("Permanent Access Road") (collectively, the "Permanent Easements") of 6,342 square feet.

26. On MBL 402-0-3, Tennessee seeks a Permanent Easement of 63,859 square feet.

27. In total, Tennessee seeks 265,045 square feet of Permanent Easements across approximately 6.0 acres of land within the Commonwealth Parcels.

28. Tennessee also needs temporary workspace ("Temporary Workspace Easements") and access road easements ("Temporary Access Road Easements") (collectively, the "Temporary Easements") in the Commonwealth Parcels over approximately fifteen and a half acres of land within or along the existing pipeline corridor in order to construct the Project as described in Tennessee's FERC Application and as authorized by FERC.

29. On MBL 405-0-8, Tennessee needs a Temporary Workspace Easement of 516,273 square feet in order to construct the Project as described in Tennessee's FERC Application and as authorized by FERC. The temporary Workspace Easement is either located inside or adjacent to the existing pipeline corridor. Additionally, Tennessee seeks a Temporary Access Road Easement of 36,957 square feet.

30. On MBL 402-0-3, Tennessee needs a Temporary Workspace Easement of 120,356 square feet adjacent to the existing pipeline corridor in order to construct the Project as described in Tennessee's FERC Application and as authorized by FERC.

31. In total, Tennessee seeks 673,586 square feet of Temporary Easements across approximately 15.46 acres of land within the Commonwealth Parcels.

32. Attached hereto, as Exhibit C, are drawings depicting the boundaries of the Permanent Easement and the Temporary Workspace Easement in MBL 405-0-8, as described in Tennessee's FERC Application and as authorized by FERC. Attached hereto as Exhibit D is a copy of an aerial photograph depicting the cleared existing pipeline corridor in MBL 405-0-8.

33. Attached hereto as Exhibit E is a drawing depicting the boundaries of the Permanent Easement, Temporary Workspace Easement and Temporary Access Road Easement in MBL 402-0-3, as described in Tennessee's FERC Application and as authorized by FERC. Attached hereto as Exhibit F is a copy of an aerial photograph depicting the cleared existing pipeline corridor in MBL 402-0-3.

34. The Permanent Easements, the Temporary Workspace Easements, and the Temporary Access Road Easement may be collectively referred to herein as the "Easements."

35. The value of the Easements, as identified in a Final Environmental Impact Report ("FEIR") Certificate ("FEIR Certificate") issued by the Secretary of the Massachusetts Executive Office of Energy and Environmental Affairs ("EEA"), exceeds \$25,000.00. (A true and accurate copy of the April 17, 2014 FEIR Certificate (without exhibits) is attached hereto as Exhibit G.)

C. TENNESSEE HAS BEEN UNABLE TO ACQUIRE THE EASEMENTS

36. It is indisputable that DCR is unwilling to voluntarily enter into an agreement that would transfer the Easements to Tennessee.

37. DCR claims the Permanent Easements are subject to Article 97 of the Massachusetts Constitution ("Article 97").¹ In a September 4, 2014 letter to FERC, DCR stated that the Permanent Easements were protected under Article 97. Also, the September 4, 2014

¹ For the purpose of Tennessee's Motion to Confirm Authority to Condemn Easements, Motion for a Preliminary and Permanent Injunction Authorizing Immediate Entry, and Consolidated Memorandum of Law only, Tennessee shall assume that the Property is subject to Article 97. However, Tennessee reserves all rights to challenge the applicability of Article 97 to the Property in future proceedings.

letter to FERC attached a July 3, 2014 letter to EEA, in which DCR stated that the Permanent Easements “require[d] approval by a 2/3 vote of the legislature, and compliance with the Division of Capital Asset Management’s [] disposition process, as well as the requirements set forth in the [EEA] Land Disposition Policy.”) (True and accurate copies of the September 4, 2014 letter from DCR to FERC and the attached July 3, 2014 letter from DCR to EEA are attached hereto as Exhibit H.) Similarly, in a June 4, 2015 letter to EEA, DCR expressed that it intended to comply with the EEA Article 97 Land Disposition Policy.² (A true and accurate copy of the June 4, 2015 letter is attached hereto as Exhibit I.) Accordingly, DCR will not transfer the Easements unless and until the transfer is authorized by two-thirds vote of the both the Massachusetts House and Senate.

38. HR 3690 – a bill authorizing the transfer of the Permanent Easements – was filed on July 10, 2015, but the Massachusetts Legislature has not scheduled HR 3690 for a vote, much less enacted HR 3690.

39. Now that the Certificate has been issued, the NGA preempts Article 97 as applied to the Easements because it conflicts with the Certificate and impedes or delays construction of the Project. Any inquiry into Tennessee’s effort to secure approval of Article 97 legislation is therefore irrelevant. Nonetheless, Tennessee has diligently sought to effect the enactment of HR 3690.

40. Tennessee waited to file HR 3690 until after obtaining a Massachusetts Environmental Policy Act (“MEPA”) Certificate so as to allow DCR and the public to review and comment on the proposed Article 97 legislation and mitigation package for impacts to DCR property. Tennessee initiated the process to apply for a MEPA Certificate in March 2014 (before

² The EEA Article 97 Land Disposition Policy is available at <http://www.mass.gov/eea/agencies/mepa/about-mepa/eea-policies/eea-article-97-land-disposition-policy.html>.

it filed its FERC Application for the Project) when it filed its Environmental Notification Form pursuant to MEPA.

41. In March 2015, after months of consultation with relevant Commonwealth officials, Tennessee submitted a FEIR pursuant to MEPA, which included draft Article 97 legislation. The FEIR contained a mitigation plan, which reflected the results of environmental reviews and consultations with Commonwealth officials about the impacted areas within the Property, and draft Article 97 legislation. At various stages of this process, public notices were provided, and limited comments were received, on the draft mitigation plan and draft legislative language.

42. On April 17, 2015, the Secretary of EEA issued the FEIR Certificate, which required an additional comment period on the draft Section 61 Findings and the draft Article 97 legislation. (*See Exhibit G.*)

43. On April 30, 2015, Tennessee submitted the draft Section 61 Findings and draft Article 97 legislation for public notice and further public review and comment. The draft Article 97 legislation incorporated DCR's request that the legislation only seek approval for the permanent easements because DCR believed temporary easements should be handled through a DCR Construction and Access Permit.

44. On June 5, 2015, after the additional public comment period, MEPA issued a Certificate ("MEPA Certificate") determining that the draft Section 61 Findings "adequately and properly complied with MEPA," and directed Tennessee to consult with DCR to finalize the Article 97 legislation. (A true and accurate copy of the MEPA Certificate (without exhibits) is attached hereto as Exhibit J.)

45. Tennessee has received permits from the Sandisfield and Agawam Conservation Commissions.

46. In the MEPA Certificate on the FEIR, the Secretary of EEA certified and memorialized that Tennessee had offered a mitigation package of \$239,280.00 to address impacts associated with the temporary and permanent easements, a \$300,000.00 contribution to a conservation trust, and an additional amount to compensate the Commonwealth for the fair market value of the easements, in an amount to be determined by the Executive Office of Administration and Finance/Division of Capital Asset Management and Maintenance (“DCAMM”). EEA further certified that Tennessee’s mitigation package, based upon a review of the Section 61 findings and other consultation with state agencies, “adequately and properly compl[ied] with MEPA.” (See Exhibit J.)

47. On information and belief, DCAMM has not yet conducted an appraisal as set forth in HR 3690. On information and belief, the fair market value of the permanent easements in MBL 402-0-3 is approximately \$9,600.00 and in MBL 405-0-8 is \$23,400.00.

48. Thereafter, Tennessee consulted with DCR and incorporated all of DCR’s comments into draft Article 97 legislation. (See Exhibit I, memorializing DCR’s requested changes.)

49. On July 10, 2015, HR 3690, which incorporated DCR’s comments, was filed with the Massachusetts House of Representatives. (A true and accurate copy of HR 3690 is attached hereto as Exhibit K.)

50. On November 10, 2015, Tennessee representatives testified at a legislative hearing and provided information about the Project. HR 3690 has not been scheduled for a vote, much less enacted.

51. On November 20, 2015 and December 2, 2015, at DCR's instruction, Tennessee filed construction permits seeking the Temporary Easements. DCR has not issued permits authorizing the transfer the Temporary Easements.

52. DCR will not voluntarily enter into an agreement transferring the Permanent Easements to Tennessee, or issuing Temporary Easements to Tennessee, unless and until both the Massachusetts House of Representatives and Massachusetts Senate authorize the transfer of the Easements by two-thirds vote. Accordingly, condemnation is necessary.

53. Now that FERC has issued the Certificate, Article 97 is preempted, and Tennessee is authorized to acquire the Easements pursuant to the NGA, 15 U.S.C. §717f(h). FERC did not expressly place any conditions on Tennessee's right to exercise eminent domain, including requiring the passage of Article 97 as a condition of the right to exercise eminent domain.

54. Therefore, pursuant to the power of eminent domain vested in it by the NGA, 15 U.S.C. §717f(h), Tennessee brings this action to condemn the Easements and to have the Court ascertain the just compensation that must be paid to DCR for the Easements.

D. REQUIRED APPROVALS, CONSTRUCTION SEQUENCE AND CONSTRUCTION SCHEDULE

55. Construction of the Project requires careful coordination of multiple teams performing various stages of work on a rolling basis throughout the length of the 13.5-mile pipeline. Pipeline construction proceeds in stages, generally as follows: pre-construction activities, tree clearing, grading, excavating, trenching, stringing, welding, installation, backfilling, cleanup, grading, and restoration. The newly constructed pipeline will then be pressure tested prior to being placed in service. The coordination of construction activities is significantly impacted by "move arounds" where work cannot proceed sequentially, or

by “shut downs” when work stops. Accordingly, timing is critical, and the Project schedule must be maintained in order for the Project to be operational in time for the winter of 2016-2017.

56. Tennessee anticipates imminently filing a Notice to Proceed with tree clearing with FERC, receiving a Notice to Proceed with tree clearing, and obtaining any other necessary federal approvals to clear trees, in the next fourteen days.

57. Tennessee cannot commence construction until it files its Implementation Plan with FERC and obtains a Notice to Proceed with construction from FERC. Tennessee anticipates imminently filing its Implementation Plan, but obtaining immediate access to the Property will significantly assist Tennessee in performing surveys, preparing reports and otherwise obtaining information in conjunction with securing permits needed to receive a Notice to Proceed with construction.

58. The transportation capacity created by the Project is fully subscribed and under long-term contract with three local distribution companies: Southern Connecticut Gas Company, Connecticut Natural Gas Company, and Yankee Gas Service Company (“Connecticut Distribution Companies”) to transport natural gas in interstate commerce to serve customers in Connecticut. The Connecticut Distribution Companies have signed contracts that include this capacity in supply forecasts commencing in the winter of 2016-2017. At the request of the Connecticut Distribution Companies, Tennessee requested FERC authorization by July 31, 2015 in its FERC Application to meet an in-service date of November 1, 2016.

59. In order for the Project to be operational for the winter of 2016-2017, construction must be completed by November 2016. Tennessee will have substantial difficulty meeting the November 1, 2016 in-service date if construction of the pipeline does not begin by June 1, 2016.

60. Tennessee needs immediate possession to perform pre-construction activities, many of which are conditions of the Certificate, including, without limitation: surveys to mark the centerline of the pipeline and right-of-way widths; flagging sensitive areas required by the Certificate; and, conducting safety and environmental orientation of crews required by the Certificate. No further authorizations are needed to perform these preconstruction activities.

61. Also, before construction can commence, Tennessee must clear trees. The EA, United States Fish and Wildlife Service (“USFWS”) guidelines issued pursuant to the Endangered Species Act, and instructions from USFWS to Tennessee after consultations between Tennessee and USFWS, all require tree clearing to occur between October 1 and March 31. Tennessee has applied for an extension from USFWS to clear trees until May 1, 2016, which it expects to receive. If the tree clearing deadline is extended to May 1, 2016 and Tennessee does not obtain an order confirming its authority to condemn the Easements and granting possession before April 15, 2016, it will be very difficult for Tennessee to be able to clear trees by May 1, 2016, construction of the Project will be delayed by more than six months, and the Project will not be operational until the winter of 2017-2018.

62. Failure to obtain possession in connection with permitting, pre-construction activities, and tree clearing, so as to allow construction to commence in June 2016, will cause Tennessee to skip sequential construction and redeploy at a later date, resulting in increased construction costs.

63. This delay will also deny utility customers the opportunity for lower natural gas prices during the winter of 2016-2017.

64. Failure to complete construction prior to the projected November 1, 2016 in-service date will also injure Tennessee's customers – the Connecticut Distribution Companies – by preventing them from meeting supply forecasts included in contracts with their customers.

65. In a letter dated February 28, 2016, Yankee Gas Service Company (one of the Connecticut Distribution Companies) advised FERC that “[t]he Connecticut LDC’s commitment to TGP’s Project was premised on a project in-service date of November 1, 2016, which would provide needed increased capacity projected for the winter 2016-2017 Winter season.” A true and accurate copy of letter to FERC dated February 28, 2016 is attached hereto as Exhibit L.

66. In a letter dated February 29, 2016, Connecticut Natural Gas Corporation and the Southern Connecticut Gas Company (the remaining two Connecticut Distribution Companies) advised FERC that the Project’s “targeted in-service date [is] November 1, 2016” and “precedent agreements acknowledg[e] the need beginning in the 2016-17 winter heating season.” A true and accurate copy of the letter to FERC dated February 29, 2016 is attached hereto as Exhibit M.

COUNT I- CONDEMNATION

67. Tennessee incorporates and restates the allegations set forth in the above paragraphs as if fully stated herein.

68. The NGA, 15 U.S.C. § 717f(h), authorizes a natural gas company to condemn any property interests necessary to construct a natural gas pipeline authorized by FERC that the company is unable to acquire.

69. Tennessee has satisfied all conditions imposed by FERC in the Certificate that are required to proceed with eminent domain.

70. Tennessee has obtained a Certificate for the Project authorizing Tennessee to construct, operate and maintain the Project as described in the FERC Application.

71. Use of the power of eminent domain to condemn is necessary to construct the Project as described in the FERC Application and as authorized by FERC.

72. The Easements are needed to construct the Project as described in the FERC Application and as authorized by FERC.

73. Tennessee has attempted, but has been unable, to obtain the Easements from DCR.

74. DCR will not voluntarily enter into an agreement transferring either the Permanent or Temporary Easements to Tennessee unless and until both the Massachusetts House of Representatives and Massachusetts Senate authorize the transfer of the Easements by two-thirds vote.

75. The Certificate preempts any requirement to obtain legislative approval to acquire the Easements.

76. Pursuant to the NGA, 15 U.S.C. § 717f(h), Tennessee is authorized and obligated to take the Easements in the Property to construct the Project.

COUNT II – PRELIMINARY INJUNCTION

77. Tennessee incorporates and restates the allegations set forth in the above paragraphs as if fully stated herein.

78. Pursuant to Mass. R. Civ. P. Rule 65, Tennessee requests preliminary and permanent injunctive relief, granting it immediate possession of the Easements, in advance of any award of just compensation, prior to the entry of final judgment to gather information in conjunction with securing permits, commencing pre-construction activities, tree clearing and subsequently to lay, construct, operate, and maintain the natural gas pipelines and related equipment and appurtenances approved in the Certificate.

79. As set forth above, it is necessary for Tennessee to obtain immediate possession in order for the Project will be operational for the winter of 2016-2017. Tennessee has satisfied the criterion for preliminary injunctive relief, as set forth in more detail in Tennessee's Consolidated Memorandum of Law in Support of its Motion to Confirm Authority to Condemn Easements and Motion for Preliminary and Permanent Injunction Authorizing Immediate Entry, for the following reasons:

- (a) Tennessee is likely to succeed on the merits because (1) Tennessee has obtained a Certificate authorizing the construction of the Project and vesting it with the power of eminent domain; (2) the Easements are necessary to construct the FERC-authorized pipeline route; and (3) Tennessee has been unable to acquire the Easements from DCR;
- (b) Tennessee will suffer irreparable harm if the preliminary injunction is not granted;
- (c) DCR will suffer no harm because it will be justly compensated for the Easements, and Tennessee has agreed to post a bond in the amount of the mitigation packages; and
- (d) the issuance of the Certificate demonstrates that the public interest will be served by the entry of preliminary injunctive relief permitting the Project to proceed in a timely fashion.

WHEREFORE, Tennessee requests that the Court:

- 1. Enter an order confirming Tennessee's authority to condemn the Easements;
- 2. Enter a preliminary and permanent injunctive order authorizing Tennessee to immediately enter and possess the Property;
- 3. Ascertain the amount of just compensation that is owed for the Easements at a trial or just compensation hearing taking place after issuance of the order confirming the authority to condemn and the issuance of the requested injunctive relief; and
- 4. Award Tennessee such other relief as may be necessary or appropriate.